STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B037(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GLEN ROBERTS AND ROBERT VIGIL,

Complainants,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,

Respondent.

An evidentiary hearing was held on December 11, 1996, before Administrative Law Judge Mary Ann Whiteside. Complainants were present and were represented by John Mosby, attorney at law. Respondent University of Colorado Health Sciences Center ("UCHSC") appeared through the appointing authority, Patrick Hellman, Director of Communication and Technical Support Services, and was represented by Daniel J. Wilkerson, Assistant University Counsel.

Respondent called the following witnesses: Dick Kovach, Jose Garcia, and Patrick Hellman. Complainants Glen Roberts and Robert Vigil testified on their own behalf.

The parties stipulated to the introduction of the exhibits attached to the parties' prehearing statements, respondent's exhibits 1 through 47 and complainant's exhibits A and B. Although complainant's exhibits A and B were stipulated to, no evidence was taken in reference to those exhibits. Respondent objected to the additional exhibits listed on complainants' December 9, 1996, supplemental prehearing statement. Those documents were not accepted into evidence, respondent's answers to complainants' and request for production of documents, were already filed by respondent on December 3, 1996, and thus are part of the record in this case. Respondent's exhibit 48 was entered over the objection of complainants' counsel.

MATTER APPEALED

The complainants appeal the disciplinary termination of their employment for failure to comply with standards of efficient service and willful misconduct.

ISSUES

1. Whether the respondent proved by a preponderance of the evidence that the complainants committed the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of alternatives available to the respondent;

3. Whether the action of the respondent was arbitrary, capricious or contrary to rule or law;

4. Whether the complainants were afforded due process;

5. Whether either party is entitled to attorney fees and costs.

PRELIMINARY MATTERS

The appeals of the two employees, Glen Roberts v. Department of Higher Education, University of Colorado Health Sciences Center, State Personnel Board case number 97B037, and Robert Vigil v. Department of Higher Education, University of Colorado Health Sciences Center, State Personnel Board case number 97B039, were consolidated under case number 97B037(C).

Complainants' request for the parties to file written closing statements was granted. Concurrent filing was ordered for December 23, 1996. Respondent's closing argument was filed on December 23, 1996. Complainants closing argument was received by fax on December 24, 1996. Although no motion for extension of time was filed, the complainants closing argument is accepted as timely and has been considered by this ALJ in reaching her decision in this case.

FINDINGS OF FACT

1. Complainants Robert Vigil and Glen Roberts were certified employees at the University of Colorado Health Sciences Center ("UCHSC") at the time their employment was terminated on September 25, 1996. At the time of their termination, both had worked at UCHSC for at least 6 years and both held the job title of Telecommunications/Electronics Specialist II.

2. At the time this case arose, Patrick Hellman was the

appointing authority. Kevin Telfer, Electronics Engineer I, and Rick Anderson, Telecommunication/Electronics Specialist IV, were the complainants' supervisors.

3. On August 22, 1996, Vigil and Roberts were scheduled to work overtime with two other UCHSC employees, Dick Kovach and Jose Garcia, beginning at 5:00 p.m. This was the first time that Dick Kovach worked overtime with Vigil, Roberts and Garcia. Kovach, a Network Analyst/Administrator I, has been employed with UCHSC since October 1, 1994. Jose Garcia, a Telecommunication/Electronics Specialist I, has been employed with UCHSC since July 10, 1995.

4. UCHSC had lost its contract for telephone service with University Hospital. The four employees were assigned to delete and remove phones from University Hospital, an assignment that required deletion of the extensions from the computer system and then the physical removal of the telephones. Kovach, Garcia, Vigil and Roberts met in the switch room at 5:00 p.m. on August 26.

5. Shortly after the four assembled, Vigil said that each of the four employees should record 3.5 hours of overtime for the project.

6. The four worked about 45 minutes deleting the phone connections from the computers. They then went across the street to University Hospital and removed the telephones. About 100 - 120 telephones were collected. The four employees took about 45 minutes to collect the phones.

7. While at University Hospital removing the phones, Kovach saw Garcia engaged in a telephone conversation. Garcia had gotten a page from his wife who reminded him that they were to attend a dinner for his god daughter that evening.

8. Kovach, Garcia, Vigil and Roberts all left by the service elevator together at approximately 6:25 p.m. In the elevator Vigil again stated that each employee should record 3.5 hours of overtime on the project.

9. Garcia left the other three and returned to his desk where he did a few minutes of paperwork. Vigil's drivers license was revoked at the time and it was necessary for his wife to pick him up. He had initially thought that she had picked him up about 7:00 p.m. but after talking with her he amended this to 6:30. The remaining three employees returned to UCHSC together, put the phones in the warehouse, and walked in the direction of their offices. Kovach returned to his office and called his son for a ride home. Kovach's son picked him up at 7:00 p.m. Kovach did not see Vigil or Roberts that night after the three had said good night. Kovach assumed that when the three separated Vigil and

Roberts went to their offices.

10. The next day, August 23, 1996, Garcia verified with Vigil the amount of hours to be put down for overtime.

11. Each employee initially recorded 3.5 hours of overtime worked on August 22.

12. On Monday, August 26, 1996, Kovach reported to Hellman that he would no longer work overtime with Roberts, Vigil and Garcia because he had been encouraged to falsify his overtime on August 22, 1996. That same day, Hellman directed Kevin Telfer, and Rick Anderson to investigate the potential August 22, 1996 overtime abuse. (exhibit 3)

13. Telfer and Anderson interviewed the four employees about the reported overtime hours for August 22, 1996. At his interview Garcia stated that the overtime hours reported for August 22, 1996 were not valid. At this time Garcia indicated that the parties had left the work site at approximately 7:10 p.m. He also stated that it was common for either Vigil or Roberts to set the overtime hours that would be claimed and that pressure is applied to conform to the "arranged" hours. (exhibit 3.)

14. At his interview, Kovach reported that the overtime hours reported for August 22, 1996 were not valid. Kovach indicated that the parties had left the work site at approximately 6:30 p.m. He stated that Vigil instructed him to report 3.5 hours of overtime and that pressure was applied to conform. (exhibit 3)

15. At their interviews, Vigil and Roberts both reported that all four employee had stayed at the work site until 8:30 p.m. and that the reported hours 3.5 hours of overtime were valid. (exhibit 3)

16. After the initial interview, Kovach was approached by Vigil who told him that management was asking questions about the overtime reported for August 22 but not to worry about it, it happens all the time. Vigil told him not to change the number of hours reported. The same day as the initial interview, Vigil approached Garcia and told him that they just needed to keep their stories straight.

17. On August 27, Hellman spoke with James Hidahl, a program administrator in UCHSC employee relations office, about his investigation into the overtime. On Hidahl's advice, Hellman asked Telfer and Anderson to obtain written statements from the four employees.

18. In his written statement Garcia reported that the 3.5 hours of overtime he had recorded for August 22, 1996 were not valid and that Vigil had a practice of pressuring other employees to claim

more overtime hours than were actually worked. (exhibit 8)

19. Kovach, in his written statement, reported that the 3.5 hours of overtime he had initially claimed on August 22, 1996, was not valid. (exhibit 9)

20. Roberts, in this written statement, maintained that he worked 3.5 hours of overtime on August 22, 1996 and that Garcia, Kovach

and Vigil were also on the project for that same amount of time. (exhibit 10)

21. In his written statement, Vigil maintained that he worked 3.5 overtime hours on August 22, 1996 with Garcia, Kovach and Roberts. (exhibit 11)

22. On August 28, 1996, Hellman conducted separate meetings with all four employees at which he gave each employee written notice of an 8-3-3 meeting scheduled for September 3, 1996. (exhibits 12-15)

23. After the meetings, Vigil, Roberts and Garcia talked together. Vigil and Roberts wanted to set up a meeting with George Thomas, the head of the Human Resources office. Vigil said all of their [Vigil, Roberts, Kovach and Garcia] stories must match so that the supervisors "wouldn't have a leg to stand on."

24. On August 29, Hellman again conducted separate meetings with the four and gave each written notice of paid administrative suspension. (exhibits 17 - 20)

25. On or about August 29, Roberts called Kovach said he and Vigil wanted to get together as a group and asked him to meet at Schmoozers, a bar nearby. Roberts asked Kovach to tell Garcia to come over to Schmoozers. Kovach did not go to Schmoozers; however, Vigil did go and met with Vigil and Roberts.

26. On September 3, 1996, Hellman conducted separate 8-3-3 meetings with each of the four employees. Vigil and Roberts were represented by John Mosby, attorney at law, who gave a statement on behalf of his clients. At that time, Vigil and Roberts, through their attorney, maintained that Garcia and Kovach had left early and that they had both stayed until 8:30 p.m. on August 22 to perform a system backup. (exhibit 24)

27. On September 3, Hellman directed Garcia and Kovach to correct their overtime reports for August 22, 1996 to reflect the accurate hours worked and to return to work. (exhibits 25 and 26)

28. On September 3, Hellman also directed Telfer to investigate Vigil and Roberts' statements that they had performed a system back up on August 22, 1996. On the same date, Telfer reported that here was no record of such a system backup. (exhibits 27 and 28)

29. On September 10, Hellman contacted Vigil and Roberts and asked them to meet in his office. Hellman had prepared additional questions he wanted them to answer. Roberts agreed to meet with Hellman at 1:00 p.m. Vigil agreed to meet at 1:30 p.m.

30. Neither Vigil nor Roberts arrived at Hellman's office until 4:30 p.m. At that time, they were given written notice of an 8-3-3 meeting for failure to comply with the terms of their administrative suspension (to remain available to report to work when asked to do so). Hellman gave each a list of additional questions with written notice that they were free to consult their representative before submitting their responses. Hellman asked that their responses be submitted by September 13. (exhibits 30 - 33)

31. On September 11, 1996, Hellman prepared a list of additional questions for Garcia and Kovach. Garcia and Kovach submitted responses prior to the requested September 13 deadline. (exhibits 34 - 36)

32. In a September 12 letter John Mosby informed Hellman that he had advised Vigil and Roberts not to appear as requested on September 10, that they waived any further 8-3-3 meetings and would stand on their responses given on September 3. (exhibit 37)

33. Hellman responded on September 12 that he considered Mosby's legal advice as a mitigating circumstance regarding Vigil and Roberts' failure to appear on September 10. Hellman gave Mosby a copy of the additional questions and extended the response deadline to September 18, 1996. (exhibit 38)

34. On September 20, Mosby informed Hellman that his clients would provide no further information beyond what they stated through counsel at the September 3 8-3-3 meeting. (exhibit 39)

35. Garcia testified that he had in the past padded his reports of overtime hours worked. Garcia initially reported 2 hours more overtime than actually worked on August 20 and 22. (exhibit 4)

36. Vigil had no previous corrective or disciplinary actions. His previous performance evaluation had been "good."

37. Roberts had received a corrective action in March, 1996 and a May, 1996 disciplinary action changing his grade and step. (exhibits 45 - 47)

38. After consideration of the information available to him and weighing the factors in rule 8-3-1, Hellman terminated Roberts and Vigil's employment at UCHSC on September 25, 1996. (exhibits 41 and 42)

39. Roberts testified that he and Vigil remained together in the PBX room running the computer back up on August 22. While the backup was running, Roberts testified that he and Vigil double checked their earlier work. Roberts did not leave the switch room until he and Vigil left at 8:30 p.m. to return to their cars in the parking garage.

40. UCHSC issued a celluar phone, number 303-748-1393, to Roberts that was mounted in his vehicle. Records for mobile phone number 303-748-1393 indicate that two phone calls were made from that mounted cellular phone at 7:04 and 7:13 p.m. on August 22. (exhibit 48)

41. On October 1, 1996, Vigil and Roberts filed timely appeals of their terminations.

DISCUSSION

In this disciplinary proceeding, the burden is on the agency to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the imposition of the discipline. Kinchen v. Department of Institutions, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's actions only if such actions are found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

The administrative law judge determines the credibility of witnesses and the weight to be given their testimony. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). As the fact finder she is entitled to accept parts of a witness's testimony and reject other parts, United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980), and can believe all, part, or none of a witness's testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

Among the factors considered in making credibility determinations in this case, the ALJ considered the witnesses' means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest; and their manner or demeanor upon the witness stand.

After a considered review of the entire record in this case,

the ALJ concludes that the respondents' witnesses are more credible and worthy of belief than the complainants. Kovach and Garcia had no reason to lie in their testimony. Complainants, however, did have such reasons. During the course of the investigation and their testimony they made inconsistent and conflicting statements. The evidence indicates that the complainants were lying, not merely mistaken in their recollection. The explanation that they initially stated that all four employees worked 3.5 hours of overtime on August 22 was to cover for Kovach and Garcia, two people not even close friends of theirs, is ludicrous. The ALJ cannot credit complainants' story that they would go to such lengths for two individuals not even close friends and place their own jobs in jeopardy. In addition, records of calls made from Roberts' mounted cellular phone, completely rebut their testimony that they worked together until 8:30 p.m. on August 22, 1996.

Complainants allege that they were denied due process in that they did not have a "full and fair opportunity to respond to all charges." (Emphasis in original, complainants closing statement, page 5.) They argue that respondent disciplined complainants for matters never raised. The initial notice of the 8-3-3 meetings stated the issues to be discussed were "allegations that overtime hours reported by you to your supervisor were more than actually worked."(exhibits 14 and 15)

Complainants argue that the letters of termination were based on matters never brought to complainants' attention, to wit:

*** Additional components of this action are that you conspired with co-workers with regard to the number of hours to be reported and you were not truthful in the information you provided during the informal meeting we had on September 3, 1996.

Board rule 8-3-3 requires an appointing authority to meet with an employee when information indicates the possible need to administer disciplinary action. An employee must be provided with advance notice of the 8-3-3 meeting. Although the notice need not be in writing, it is the common and best practice to do so, and that is what occurred here. The notice should advise the employee of the purpose of the meeting and that he has the right to have a representative present. During the meeting, the appointing authority is required to present the information to the employee and to give the employee an opportunity to admit or refute the information or to present information in mitigation.

In the case of Bourie v. University of Colorado Health Sciences Center, P.2d , (Court of Appeals case number 95CA0464, decision issued May 16, 1996), State Personnel Board case number 94G041, the Colorado Court of Appeals held that

neither the rule, nor fundamental due process, require the appointing authority to provide the employee with the reports, statements of witnesses or other evidence relating to the matter prior to or at the initial meeting. See also, Chelius v. Department of Corrections, (Court of Appeals case number 95CA1144, decision issued May 16, 1996) (NSOP), State Personnel Board case number 94B034, and Wilson v. Department of Human Services, (Court of Appeals case number 94CA1862, decision issued May 23, 1996) (NSOP), State Personnel Board case number 94B065.

Complainants were properly advised in writing that an 8-3-3 meeting would be held and the reasons for such a meeting. The appointing authority asked for additional information from complainants. Complainants did not avail themselves of the opportunity to provide additional information for consideration by the appointing authority even after being give several extensions to do so. The appointing authority also investigated complainants' claim that they had done computer backup the evening of August 22.

The information given to the complainants was sufficient to inform them of the general nature of the facts leading to the disciplinary proceeding and satisfied due process requirements for the informal meeting contemplated under rule 8-3-3. Department of Health v. Donahue, 690 P.2d 243 (Colo. 1984).

In addition to the initial notice stating the issues to be discussed as "allegations that overtime hours reported by you to your supervisor were more than actually worked," among the additional questions to which the appointing authority requested answers were:

(1) Have you reported overtime hours that were in excess of those actually worked during your period of employment with the UCHSC?

(4) Upon being placed on administrative suspension on August 29th, did you call or in any other way attempt to contact any HSC Information System staff members to discuss the suspension and/or other facts regarding this situation? Did you request that they meet you at a location away form the HSC campus? Did you meet with them?

(exhibits 32 and 33)

Due process requires that employees have an opportunity to be heard. There is no denial of due process if an employee fails to take advantage of the opportunity. Here complainants, represented by counsel, failed repeatedly to take advantage of several opportunities to offer additional information for consideration of the appointing authority.

Respondent has met its burden in this case. The evidence shows by a preponderance that the incidents alleged did occur. These incidents support the conclusions of the appointing authority. The discipline imposed was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1.

CONCLUSIONS OF LAW

1. Respondent proved by a preponderance of the evidence that complainants committed the acts for which discipline was imposed;

2. The discipline imposed was within the range of alternatives available to the appointing authority;

3. Respondent's action in terminating complainants' employment was not arbitrary, capricious or contrary to rule or law.

4. There was no violation of due process in the conduct of the 8-3-3 meeting.

5. Neither party is entitled to an award of attorney fees or costs.

ORDER

Respondent's action is affirmed. Complainants' appeal is dismissed with prejudice.

DATED this ___ day of January, 1997, at Denver, Colorado.

Mary Ann Whiteside
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must

be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ___ day of January, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

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